

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

MELANIE FLETCHER

v.

TRAC BUILDERS, INC.,
NELSON FERREIRA and
WILLIAM E. TRACEY

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C.A. No. 16-027S

REPORT AND RECOMMENDATION

Lincoln D. Almond, United States Magistrate Judge

Pending before me is Plaintiff's Motion to Dismiss pursuant to Rule 41(a)(2), Fed. R. Civ. P. (ECF Doc. No. 51). Plaintiff seeks to voluntarily dismiss Counts I and II "without prejudice" as to individual Defendants Tracey and Ferreira. Defendants object and argue that such dismissal should be "with prejudice." (ECF Doc. No. 55). For the following reasons, I agree with Defendants and recommend that Plaintiff's Motion to Dismiss be GRANTED but that the dismissal be "with prejudice."

Under Rule 41(a)(2), Fed. R. Civ. P., an action may be dismissed at the plaintiff's request "only by court order, on terms that the court considers proper." "Unless the order states otherwise, a dismissal under [Rule 41(a)(2)] is without prejudice." Id. Here, I conclude that a dismissal with prejudice is warranted by the facts and law.

Count I asserts claims under Title VII of the Civil Rights Act of 1964, and Count II asserts claims under Rhode Island's Fair Employment Practices Act (RIFEPA). Both Counts are pled against both Trac Builders and the individual Defendants Tracey and Ferreira. At the time Plaintiff filed this Complaint, there was controlling First Circuit precedent (Fantini v. Salem State Coll., 557

F.3d 22 (1st Cir. 2009)), holding that there is no individual liability under Title VII. In addition, this Court had previously certified the question of whether there was individual liability under RIFEPA to the Rhode Island Supreme Court. On March 8, 2017, the Supreme Court answered the certified question in the negative holding that RIFEPA does not provide for the individual liability of an employee of a defendant employer. See Mancini v. City of Providence, 155 A.3d 159 (R.I. Supreme Court March 8, 2017). Although they never moved for dismissal under Rule 12, Defendants' Fourth Affirmative Defense raises the defense of the lack of individual liability under Title VII and RIFEPA. Thus, at the time Plaintiff filed her complaint, there was no legal support in this Circuit for a claim of individual liability under Title VII, and, at the time Plaintiff filed the instant Motion to Dismiss without prejudice, there was also no legal support in Rhode Island for a claim of individual liability under RIFEPA. Thus, Counts I and II should be dismissed as to Defendants Tracey and Ferreira for failure to state a claim, and such dismissal should be with prejudice under these circumstances.¹

For the foregoing reasons, I recommend that Plaintiff's Motion to Dismiss Counts I and II as to Defendants Tracey and Ferreira (ECF Doc. No. 51) be GRANTED pursuant to Rule 41(a)(2), Fed. R. Civ. P. but that such dismissal be expressly "with prejudice."

Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of the Court within fourteen days of its receipt. See Fed. R. Civ. P. 72(b); LR Cv 72. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the

¹ Plaintiff argues for dismissal without prejudice because there is a pending bill before the Rhode Island General Assembly (Senate Bill No. 773) which would impose individual liability under RIFEPA. However, on April 26, 2017, the Senate Labor Committee recommended that the Bill be held for further study and thus it appears unlikely that the proposed amendment to RIFEPA will become law this legislative session. In any event, even if it did, there would likely be due process obstacles to applying the amendment retroactively in view of the Rhode Island Supreme Court's pronouncement of the law's plain meaning prior to any amendment as excluding individual liability.

District Court and the right to appeal the District Court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
June 28, 2017